

(1) Indicted for or suspected, upon adequate evidence, of the causes described in 48 CFR (DEAR) 909.406-2(c)(1).

(2) On the basis of the causes set forth in 48 CFR (DEAR) 909.406-2(d)(2).

(3) On the basis that an organization or individual is an affiliate of a suspended or debarred contractor.

909.407-3 Procedures. (DOE coverage—paragraphs (b) and (e))

(b) Decisionmaking process.

(1) In actions based on an indictment, the Suspending Official shall make a decision based upon the administrative record, which shall include submissions made by the contractor in accordance with 48 CFR (DEAR) 909.406-3(b)(1) and 909.406-3(b)(3).

(2) For actions not based on an indictment, the procedures in 48 CFR (DEAR) 909.406-3(b)(2) and FAR 9.407-3(b)(2) apply.

(3) Coordination with Department of Justice. Whenever a meeting or fact-finding conference is requested, the Suspending Official's legal representative shall obtain the advice of appropriate Department of Justice officials concerning the impact disclosure of evidence at the meeting or fact-finding conference could have on any pending civil or criminal investigation or legal proceeding. If such Department of Justice official requests in writing that evidence needed to establish the existence of a cause for suspension not be disclosed to the respondent, the Suspending Official shall:

(i) Decline to rely on such evidence and withdraw (without prejudice) the suspension or proposed debarment until such time as disclosure of the evidence is authorized; or

(ii) Deny the request for a meeting or fact-finding and base the suspension decision solely upon the information in the administrative record, including any submission made by the respondent.

(e) Notice of suspending official's decision. In actions in which additional proceedings have been held, following such proceedings, the Suspending Official shall notify respondent, as applicable, in accordance with paragraphs (e)(1) or (e)(2) of this section.

(1) Upon deciding to sustain a suspension, the Suspending Official shall promptly send each affected respondent a notice containing the following information:

(i) A reference to the notice of suspension, the meeting and the fact-finding conference;

(ii) The Suspending Official's findings of fact and conclusions of law;

(iii) The reasons for sustaining a suspension;

(iv) A reference to the Suspending Official's waiver authority under 48 CFR (DEAR) 909.405;

(v) A statement that the suspension is effective throughout the Executive Branch as provided in FAR 9.407-1(d);

(vi) Modifications, if any, of the initial terms of the suspension;

(vii) A statement that a copy of the suspension notice was sent to GSA and that the respondent's name and address will be added to the GSA List; and

(viii) If less than an entire organization is suspended, specification of the organizational element(s) or individual(s) included within the scope of the suspension.

(2) If the Suspending Official decides to terminate a suspension, the Suspending Official shall promptly send, by certified mail, return receipt requested, each affected respondent a copy of the final decision required under this section.

[61 FR 39857, July 31, 1996; 61 FR 41684, Aug. 9, 1996]

Subpart 909.5—Organizational Conflicts of Interest

909.500 Scope of subpart.

DOE acquisitions will be processed in accordance with 909.570 below rather than as provided at FAR subpart 9.5 with respect to organizational conflicts of interest. However, the coverage at FAR subpart 9.5 regarding marketing consultants does apply to DOE acquisitions.

[49 FR 11949, Mar. 28, 1984, as amended at 59 FR 66264, Dec. 23, 1994]

909.570 DOE organizational conflicts of interest.**909.570-1 Scope of section.**

This section sets forth Department of Energy policies and procedures regarding organizational conflicts of interest (OCI) and is issued pursuant to section 644 of the Department of Energy Organization Act (Pub. L. 95-91) to implement the requirements of the Federal Nonnuclear Energy Research and Development Act of 1974 (Pub. L. 93-577), as amended, and the Federal Energy Administration Act of 1974 (Pub. L. 93-275), as amended.

909.570-2 Policy.

It is the policy of the DOE to identify and avoid or mitigate organizational conflicts of interest before entering into contracts, agreements, and other arrangements.

909.570-3 Definitions.

Affiliates means business concerns which are affiliates of each other when either directly or indirectly one concern or individual controls or has the power to control another, or when a third party controls or has the power to control both.

Architect-engineering services means the work or effort of a professional nature associated with the study, test, design, supervision, and construction, alteration, or repair of real property including utilities and appurtenances thereto. Such services embrace conceptual design and Title I, Title II, and Title III work, as defined in 936.605(c).

Contract for purposes of implementing policy on organizational conflicts of interest, means any contract, agreement or other arrangement with the Department.

Contractor means any person, firm, unincorporated association, joint venture, partnership, corporation or affiliates thereof, which is a party to a contract with the Department.

Evaluation services or activities means any work or effort involving the independent study of technology, process, product, or policy.

Offeror means any person, firm, unincorporated association, joint venture, partnership, corporation or affiliates thereof, submitting a bid or proposal,

solicited or unsolicited, to the Department to obtain a contract or modification thereof.

Organizational conflicts of interest means that a relationship or situation exists whereby an offeror or a contractor (including chief executives and directors, to the extent that they will or do become involved in the performance of the contract, and proposed consultants or subcontractors where they may be performing services similar to the services provided by the prime) has past, present, or currently planned interests that relate to the work to be performed under a Department contract and such interest or interests may reasonably (1) diminish an offeror's or contractor's capacity to give impartial, technically sound, objective assistance and advice, or (2) result in an offeror's or contractor's being given an unfair competitive advantage. It does not include the normal flow of benefits from the performance of the contract.

Research and development means any work or effort, the principal purpose of which involves (1) theoretical analysis, exploration, or experimentation; or (2) extension of investigative findings and theories of a scientific or technical nature into practical application for experimental and demonstration purposes, including the experimental production and testing of models, devices, equipment, materials, and processes.

Subcontractor means any subcontractor of any tier which performs work under a contract.

Technical consulting and management support services means any work or effort to provide internal assistance to any program element or other organizational component of the Department in the formulation or administration of its programs, projects, or policies. Such services typically include assistance in the preparation of program plans; evaluation, monitoring, or review of other contractors' activities or proposals submitted by prospective contractors; preparation of preliminary designs, specifications, or statements

of work; and may involve the contractor's being given access to data confidential to the Department or proprietary to others.

[49 FR 11949, Mar. 28, 1984, as amended at 59 FR 66264, Dec. 23, 1994]

909.570-4 Criteria for recognizing organizational conflicts of interest.

(a) *General.* Two questions should generally be asked in determining whether organizational conflicts of interest exist: (1) Are there conflicting roles which might bias a contractor's judgment in relation to its work for the Department? (2) Is the contractor being given an unfair competitive advantage based on the performance of the contract? The ultimate determination as to whether organizational conflicts of interest exist should be made in the light of common sense and good business judgment based upon the relevant facts and the work to be performed. While it is difficult to identify, and to prescribe in advance, a specific method for avoiding all the various situations or relationships which might involve potential organizational conflicts of interest, Department personnel must pay particular attention to proposed contractual requirements which call for the rendering of advice, or consultation or evaluation services, or similar activities that are expected to play a part in the Department's decisions on future acquisitions; research, development, and demonstration programs; production activities; the formulation of departmental policy; and regulatory activities.

(b) *Situations or relationships involving organizational conflicts of interest.* The following general examples (which are not all-inclusive) illustrate situations or relationships where potential organizational conflicts of interest frequently arise. Specific examples are set forth at 909.570-14.

(1) Contract performance involving the preparation and furnishing of complete or essentially complete specifications which are to be used in competitive acquisition for the furnishing of products or services.

(2) Contract performance involving the preparation and furnishing of a detailed plan for specific approaches or

methodologies that are to be incorporated in a competitive acquisition.

(3) Contract performance involving access to internal information not available to the public concerning Departmental plans or programs and related opinions, clarifications, interpretations, and positions.

(4) Contract performance involving access to information proprietary to third parties which cannot lawfully be used for purposes other than those authorized by those third parties.

(5) Contract performance involving evaluation of the contractor's products or services, or the products or services of another party, where the contractor is or has been substantially involved in their development or marketing.

(6) Contract performance involving the preparation and furnishing of advice to the Department in a technical area where the contractor is also providing consulting assistance in the same area to any other organization.

(7) Contract performance involving the preparation and furnishing of advice to the Department on a regulatory matter where the contractor would be regulated or is providing, or is currently planning to provide, assistance on the same or similar matter to any organization regulated by the Department.

(c) *Other considerations.* An organizational conflict of interest may exist or arise:

(1) Even though no follow-on acquisition is anticipated;

(2) Even though a hardware exclusion clause may not be appropriate; and

(3) When a contract is awarded on a noncompetitive or a sole source basis.

(d) An organizational conflict of interest is more likely to be disclosed if a contract is competitive. Accordingly, greater care shall be exercised in the absence of competition.

[49 FR 11949, Mar. 28, 1984, as amended at 59 FR 66264, Dec. 23, 1994]

909.570-5 Disclosure of organizational conflicts of interest.

(a) When submitting solicited and unsolicited proposals for (1) evaluation services or activities; (2) technical consulting and management support services; (3) research and development conducted pursuant to the authority of the

Federal Energy Administration Act of 1974 (Pub. L. 93-275), as amended; and (4) other contractual situations where special organizational conflicts of interest provisions are noted in the solicitation and included in the resulting contract, offerors shall be required to identify and disclose information about contracts, investments, and all other interests relating to the work to be performed under the proposed contract or complete the representation in accordance with 909.570-7.

(b) This requirement shall also apply to modifications of contracts of the types noted in paragraph (a) of this section that exercise an option or otherwise meaningfully extend the period of performance or add work, of the type noted in paragraph (a), to the contract. Where, however, a disclosure statement of the type required by the Organizational Conflicts of Interest Disclosure or Representation provision has previously been submitted with regard to the contract being modified, only an updating of such statement need be submitted. Information submitted by offerors pursuant to the disclosure requirement shall be treated by the Department, to the extent permitted by law, as confidential information to be used solely for OCI purposes.

(c) When the Government finds that an organizational conflict of interest exists or may exist with respect to an offeror or contractor, no award of a contract or contract modification covered by 909.570-7 shall be made until the organizational conflict of interest has been avoided, except as provided in 909.570-9. An organizational conflict of interest has been avoided when corrective actions taken to remedy it result in there being little or no likelihood of an organizational conflict of interest.

[59 FR 66264, Dec. 23, 1994]

909.570-6 Notices and representations: Action required of contracting officers.

The disclosure or representation required by 909.570-7 is designed to alert the contracting officer to situations or relationships which may constitute either present or anticipated organizational conflicts of interest with respect to a particular offeror or contractor. Another type of organizational conflict

of interest may exist in that work to be performed will lead to a subsequent requirement with the result that the successful proposer on the current solicitation will be barred by operation of paragraph (b)(1)(i) of the clause at 952.209-72 from proposing on the later solicitation. Accordingly, whenever such potential conflicts are foreseeable by the Government, a special notice also shall be included in the solicitation informing the offerors (a) that such a potential conflict is foreseen and (b) of any special contract clause or provision designed to avoid or mitigate such conflict that will be included in any resultant contract as required by 909.570-8(a). Such notice shall specify the proposed extent and duration of any special restrictions to be imposed with respect to participation in subsequent acquisitions. A fixed term of reasonable duration is measured by the time required to eliminate what would otherwise constitute an unfair competitive advantage. In the event a contractor, having performed on one contract, later seeks work that stems or may be deemed to stem directly (*i.e.*, arising out of or relating to) from prior performance, such contractor shall not be precluded from proposing on follow-on work unless the prior contract contained an appropriate follow-on restriction. Nevertheless, this absence of restriction shall not preclude the contracting officer from finding that, in light of performance of the prior contract, an organizational conflict of interest would or may exist.

[59 FR 66265, Dec. 23, 1994]

909.570-7 Disclosure or representation.

The contracting officer shall include the provision at 952.209-70, Organizational Conflicts of Interest-Disclosure or Representation, in all solicitations, including those for scope modifications, and offerors shall accordingly disclose or represent in their proposals, including unsolicited proposals for (a) evaluation services or activities; (b) technical consulting and management support services; (c) research and development conducted pursuant to the authority of the Federal Energy Administration Act of 1974 (Pub. L. 93-